IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.;)
REACH ONE, TEACH ONE)
OF AMERICA, INC.,)
)
Plaintiffs,)
) Case Number: 3:06-CV-224-WKW
v.)
)
SHERIFF DAVID WARREN, in his official)
capacity as the SHERIFF OF MACON)
COUNTY, ALABAMA,)
)
Defendant.)

MACON COUNTY INVESTMENTS, INC. AND REACH ONE, TEACH ONE OF AMERICA'S RESPONSE MACON COUNTY GREYHOUND PARK, INC'S MOTION TO QUASH AND/OR MODIFY SUBPOENA

COMES NOW the Plaintiffs and hereby submit the following Response to Macon County Greyhound Park, Inc.'s Motion to Quash and/or Modify Subpoena:

1. Macon County Greyhound Park, Inc. ("MCGP") seeks to quash the subpoena served upon them on a number of grounds. MCGP first argues that the subpoena is invalid because it was served via certified mail rather than personal service. MCGP further argues that personal service is required by Fed.R.Civ.P. 45. This argument is unfounded. The text of Rule 45 makes no statement that service may only be effectuated by personal service. Furthermore, several cases have held that service of subpoenas on corporations may be allowed by less than personal service, S*ee Hall v. Sullivan*, 229 F.R.D. 501, 503-506 (D.Md. 2005) (holding that service via federal express was sufficient to comply with Rule 45); *Doe v. Hersman*, 155 F.R.D. 630, 630-31 (N.D. Ind. 1994) (holding that service via certified mail is sufficient, and further noting that

neither the text or purpose of Rule 45 requires personal service).

The purpose of the service requirements of Rule 45 should also be considered throughout all MCGP's arguments regarding improper service. Obviously, the purpose and intent of Rule 45 is to ensure that a person being summoned to appear is given full and proper notice. A brief summation of the history between the Plaintiffs and MCGP demonstrates that both MCGP and its counsel have not only been placed on full notice of the subpoena they seek to quash, but were also directly involved in deciding some of the exact terms set forth in the subpoena.

The Plaintiffs served a similar subpoena on MCGP February 26, 2007. *See Plaintiff's Exhibits 1 and 2*. MCGP forwarded the subpoena to its counsel, who then filed an objection to the subpoena on or around March 9th, 2007. *See Plaintiff's Exhibit 3*. On March 14th, 2007, Counsel for MCGP and the Plaintiffs then had a detailed telephone conversation regarding the parameters and terms to be used in the subpoena, and the Plaintiffs agreed to withdraw the subpoena served on 2-26-07 and to issue another subpoena under more specific terms.[1] *See Plaintiff's Exhibit 4*. The Plaintiffs then reissued the subpoena referenced in the motion on March 19th, 2007, and a copy of this motion was also served on counsel for MCGP. *See Plaintiff's Exhibit 5*. MCGP has not only received full and adequate notice of the subpoena in question, but its counsel was directly involved in discussions about the terms which would be used in the subpoena. Accordingly, the service requirements of Rule 45 have been fully complied with.

2. MCGP next contends that the subpoena is due to be quashed because the

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[1] The Plaintiffs do not contend that counsel for MCGP waived any objections during this conversation. The conversation simply cleared up terms and definitions so that the items and issues requested in the subpoena would be clear.

subpoena was signed for by someone other than Milton McGregor, who is the registered agent for service of process. This is the fault of no one but MCGP. The service agent and address that MCGP has registered with the Alabama Secretary of State is Milton McGregor, P.O. Box 128, Interstate 85, Exit 22. *See Plaintiff's Exhibit 5*. This is the exact person and address that the Plaintiffs addressed the subpoena to via certified mail, which is all the law requires them to do. *See MCGP's Exhibit C*. The Plaintiffs cannot prevent the employees of MCGP from intercepting certified mail directly addressed to Mr. McGregor. Furthermore, a copy of this subpoena was also served on counsel for MCGP. *See Plaintiffs' Exhibit 5*. Accordingly, the motion is due to be denied.

3. MCGP next argues that the subpoena is due to be quashed because no witness fee or mileage fee was attached to the subpoena. The Plaintiffs agree that the witness is due to receive a witness and mileage fee prior to attending the deposition, but the failure to attach such fees to the subpoena is at most a technical defect which can be cured by subsequent tender of the fees without quashing the subpoena. *See PHE, Inc. v. Department of Justice*, 139 F.R.D. 249, 255-256 (D.D.C. 1991) (holding that the subsequent tender of fees associated with a subpoena cured any technical deficiencies, and holding that the subpoena was therefore valid); *Richardson v. Glickman*, 1997 WL 382048, p. 2 (E.D. La) (holding that the failure to submit witness and mileage fees along with subpoena was merely a technical defect which could be cured); See also *Meyer v. Foti*, 720 F.Supp. 1234, 1244 (E.D.La. 1989).

The Plaintiffs have no way of knowing who the corporate representative will be for MCGP or where the witness will be coming from, and therefore cannot estimate the mileage fee. However, the Plaintiffs will gladly confer with counsel for MCGP to gather this information and promptly forward the mileage and witness fees. The Plaintiffs further have no objection to this Court entering an order stating that witness shall not be required to attend the deposition without first receiving witness and mileage fees. However, MCGP's request to quash the subpoena on this ground is inappropriate, and is due to be denied.

4. Finally, MCGP argues that the subpoena is due to be quashed pursuant to Fed.R.Civ.P 45(c)(3), which authorizes a court to quash subpoenas that seek confidential information. MCGP further correctly notes that courts in the Eleventh Circuit typically incorporate a balancing test in determining the compulsion of non-party discovery. However, the incorporation of the balancing test is the exact reason that the matters sought in the subpoena should be subject to discovery.

It should first be noted MCGP is not simply an unrelated non-party that is only tenuously connected to this litigation. The entire premise of the Plaintiffs' case is that the unconstitutional promulgation of bingo licensing rules by Sheriff David Warren has established an outright monopoly on licensed bingo facilities in Macon County via. MCGP is that monopoly. As such, MCGP is squarely in the middle of this case. Accordingly, their status as a "non-party" is not a factor that should weigh against disclosure

Essentially, MCGP argues that the information sought is confidential simply because the subpoena requests information regarding income and corporate ownership and management. This is unfounded. The bingo facility associated with MCGP is operated in conjunction with approximately 60 non-profit organizations, and the financial information that is sought by the subpoena is directly related to income related to these non-profit organizations. The Bingo facilities could not be legally operated without the association of the non-profit organizations, See Ala. Const. Amend. 744 (1901). Accordingly, MCGP's arguments that this information is confidential is unfounded.

Even if the Court were to accept MCGP's assertion that the information sought is confidential, the information would still be subject to discovery. Fed.R.Civ.P. 45(c)(3)(B) provides that, if a nonparty shows that the sought after information is confidential commercial information, the burden shifts to the requesting party to show a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated. *See Kona Spring Water Distributing, Ltd. v. World Triathlon Corp.*, 2006 WL 905517, p. 2 (M.D.Fla.,2006).

The Plaintiffs have a substantial need for the information sought in the subpoena. The basis of this lawsuit is that Sherriff Warren is creating a monopoly for MCGP by the promulgation of unconstitutional licensing rules. The discovery of this financial information will demonstrate the enormous amounts of revenue that are being generated by the operation of the bingo facility operated by MCGP, and will therefore clearly demonstrate the true motivation and lack of a good faith in the promulgation of these outlandish licensing rules. A demonstration of a lack of good faith is of paramount importance in this case, because it would serve to directly rebut the "rational basis" arguments set forth by Defendant Warren regarding his reasons for the promulgation of the rules in question.

The Plaintiffs can also demonstrate that they cannot obtain this information otherwise without undue hardship. The Plaintiffs have previously requested some of this same information directly from Defendant Warren, but the information has yet to be received. Accordingly, the information is also being sought from MCGP as it is the only other entity with possession of this information.

5. MCGP's motion to quash is due to be denied. The Plaintiffs have asserted that the information sought is highly relevant, and that it cannot be obtained through other means without substantial hardship. The items sought in the subpoena are detailed and particular. In fact, counsel for the Plaintiffs conferred directly with counsel for MCGP prior to the issuance of the subpoena to ensure that the requests would be as clear, specific, and particular as possible. Accordingly, MCGP's motion is due to be denied.

Respectfully submitted,

_/s/ Christopher K. Whitehead_________________
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record via U.S. Mail and the courts electronic filing system on this the 27th day of April, 2007.

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